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No.

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In The

Supreme Court of the United States

OCTOBER TERM, 1980

THOMAS S. LEONHARD, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Are the constitutional claims of Thomas Leonhard barred by the statute of limitations?

II. Have the Leonhard children failed to state constitutional claims upon which relief can be granted?

III. Does the Eleventh Amendment bar all claims asserted against the state defendants?

IV. Are the Plaintiffs' federal tort claims barred by the two-year filing provision of 28 U.S.C. 2401(b)?

V. Have the Plaintiffs failed to state valid tort claims against the United States?

PARTIES

Plaintiffs-Petitioners:

Thomas S. Leonhard, Individually and as Parent and Legal Guardian of Michael Leonhard, An Infant, Stephan Leonhard, An Infant, and Karen Leonhard, An Infant

Defendants-Respondents:

United States of America; United States Department of Justice; the Hon. Griffin Bell and his predecessors in office to and including the Hon. John Mitchell, individually and in their official capacity; Thomas A. Kennelly, individually and in his official capacity; Gerald Shur, individually and in his official capacity; Benhamin R. Civiletti, individually and in his official capacity; The United States Marshals Service; Wayne B. Colburn, Director, and his predecessors in office to 1967, individually and in their official capacity; John Cameron, individually and in his official capacity; Five Unknown Agents of the United States Department of Justice, individually and in their official capacity; The New York State Department of Correctional Services; Benjamin Ward, and his predecessors in office to 1967, individually and in their official capacity; The New York State Board of Parole; Eugene Hammock, and his predecessors in office to 1967, individually and in their official capacity; The City of Buffalo; Samuel Giambrone, individually and in his official capacity; Pascal Calabrese, individually and in his official capacity.

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OPINIONS BELOW

The opinion of the Court of Appeals, dated August 28, 1980 is not officially reported and is printed in Appendix A, at p. A-8 et seq.

The opinion of the District Court, dated September 21, 1979 dismissing the claims against the federal defendants and the City of Buffalo, is not officially reported and is printed in Appendix A at p. A-64 et seq. The letter of Judge Burke, dated November 19, 1979, amending this opinion to include the claims against Samuel Giambrone, is printed in Appendix A at p. A-75.

The opinion of the District Court dismissing the claims against the state defendants, dated October 25, 1979 is not officially reported and is printed in Appendix A at p. A-72 et seq.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals sought to be reviewed is dated, and was entered, August 28, 1980. A motion was made on behalf of the petitioners for an extension of time to file a petition for rehearing and was granted by the Court of Appeals on September 24, 1980. The petition for rehearing was denied by the Court of Appeals on October 24, 1980. The orders and judgments referred to are printed in Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendments I, IV, V, IX and IV, because of their length, are printed in Appendix B.

Likewise, 28 U.S.C. §§2401, 2674, 42 U.S.C. §1983 and Organized Crime Control Act of 1970, P.L. 91-452, Title V, §§501-504, 84 Stat. 933 (1970), because of their length are printed in Appendix B.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

This action arises out of events beginning on September 29, 1966 when a decree was granted by the Supreme Court of the State of New York dissolving the marriage between Rochelle Leonhard and the plaintiff, Thomas Leonhard. By virtue of this decree, custody of the Leonhard's minor children, Michael, Karen and Stephan was granted to the mother, with visitation rights to the plaintiff, Thomas Leonhard. Prior to the divorce, the mother became involved with, and in February, 1966, purportedly married Pascal Calabrese. The marriage was bigamous because they married before the finalization of the Leonhards' divorce.

Calabrese was convicted of armed robbery sometime late in 1966 and was sentenced to a lengthy term of imprisonment in a

New York State correctional institution. Thereafter, through the continuous efforts of Sgt. Samuel Giambrone, of the Buffalo Police Department, Calabrese was introduced to members of the United States Justice Department's Organized Crime Task Force in Buffalo, New York. In exchange for Calabrese's anticipated testimony against certain reputed organized crime figures, agents of this department promised Calabrese his release from prison, as well as a new identity for himself, the mother and the children of the plaintiff, Thomas Leonhard.

Prior to Calabrese's testimony, he was relocated from the New York State prison to federal custody. In August, 1967, without any regard for the interests of Thomas Leonhard, the mother and children were taken into the custody of the Justice Department. Calabrese's testimony was then used to secure the desired convictions, and as agreed, in 1968, with the assistance and cooperation of the New York State Department of Corrections and Parole Board, he was discharged from the term of imprisonment. Thereafter, and continuously until 1975, the Justice Department through the United States Marshals Service, provided Calabrese, the mother and the three plaintiff children with new identities, and kept their location and whereabouts secret.

Upon becoming aware of his children's absence when attempting to visit them, Thomas Leonhard attempted to learn of his children's whereabouts and have their location revealed by the Justice Department. Because he was unsuccessful in obtaining this information voluntarily, in June, 1971, he began a state court proceeding and obtained an order modifying the divorce decree; by the order he was granted custody of his children. Thereafter, a mandamus action against various agents and departments of the federal government was initiated in the United States District Court for the Western District of New York (Civil Action No. 1971-359), requesting that the Court order the defendants to disclose the whereabouts of his children. That Court, without a hearing, denied the requested relief; its decision

was affirmed on appeal. *Leonhard v. Mitchell*, 473 F.2d 709 (2nd Cir.) cert. den. 412 U.S. 949 (1973). In July of 1975, more than eight years after they were taken from him, Thomas Leonhard located and saw his children again, without any assistance from the defendants herein.

This action was brought by Thomas Leonhard in the United States District Court for the Western District of New York (Civil Action No. 78-357), individually and as parent and legal guardian of Michael, Karen and Stephan Leonhard. It alleges that the three classes of defendants, individually and in their official capacity, acting in concert, and beyond the scope of their authority, caused the breakup of the relationship between the plaintiffs as father and children. It further alleges that by separating and concealing the children from their father, the defendants have deprived the parties of their constitutional rights to family integrity; the plaintiff, Thomas Leonhard's constitutional rights to raise, rear, nurture, educate and bring up according to one's religion and conversely, the plaintiffs, Michael, Karen and Stephan Leonhards' rights to be raised, reared, educated, supported, maintained and brought up according to one's religion. Relief was partially based upon the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983. Jurisdiction over these claims was conferred by 28 U.S.C. §§1331 and 1343. Other relief was founded upon Title V of the Organized Crime Control Act of 1970, §§ 501-504, P.L.91-452 (1970), the Federal Tort Claims Act (28 U.S.C. §2674) and state tort law, with jurisdiction conferred by 28 U.S.C. §§1346(a), (b) and pendent jurisdiction. Relief in the nature of declaratory judgment was also requested.

After all but one of the defendants served with process so moved, the District Court, by way of two opinions, ordered the dismissal of the actions in favor of all of the defendants. The dismissal was affirmed on appeal to the United States Court of Appeals for the Second Circuit, and this petition follows.

REASONS FOR GRANTING THE WRIT

I.
Preliminary Statement

In presenting the arguments contained in the present petition, it is stressed to this Court that the Court of Appeals reviewed and affirmed orders entered upon motions to dismiss the plaintiffs' complaint. The Court of Appeals in its review of the District Court's action, misapplied and ignored the basic rules of law applicable to the determination of a motion to dismiss by not assuming the allegations contained in the complaint to be true and by construing the allegations unfavorably to the plaintiffs.

This lawsuit is complex, involving eight years of continuous conduct by the defendants at three levels of government. Aware of this, the plaintiffs endeavored to ensure that their complaint complied as closely as possible with the mandate of Federal Rule of Civil Procedure 8(a) in that it contains "a short and plain statement of the claim showing that the pleader is entitled to relief..." In opposition to the motion to dismiss, the plaintiffs were entitled to have the allegations in the complaint taken as true as well as construed liberally in their favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Kossick v. United Fruit Co.*, 365 U.S. 731, 732 (1961).

The applicable principles were concisely stated in *Conley v. Gibson*, 355 U.S. 41, 45-46, 47 (1957):

> [T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief... the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's

> claim is and the grounds upon which it rests [footnotes omitted].

As will appear in the following discussions, the Court of Appeals violated each of these principles in their affirmance of the District Court. Not only was the plaintiffs' complaint construed against them, but without the reception of any evidence, allegations in the complaint were ignored and certain facts contained in the allegations found not to exist by the Court. As will become apparent, after viewing the plaintiffs' complaint as it should be under the above principles, the judgment of the Court of Appeals should be reversed.

II.

The Plaintiffs Have Stated Valid Constitutional and Federal Tort Claims Upon Which Relief Can Be Granted

After stating that defenses based upon the statute of limitations and collateral estoppel did not bar the claims asserted on behalf of the Leonhard children against the federal defendants, the Court of Appeals held their claims were properly dismissed for failure to state a cause of action. This rationale was used as an alternative ground to affirm the dismissal of the claims made against the state and city defendants. Contrary to the Court of Appeals' view of this lawsuit, valid claims upon which relief can be granted have been advanced on behalf of Michael, Karen and Stephan Leonhard.

As the Court of Appeals stated, it has been "recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). This relationship gives rise to rights worthy of protection on behalf of the parent as well as on behalf of the children. *Moore v. City of East Cleveland*, 431 U.S. 494, 503-6 (plurality opinion) (1977), and cases cited in *Prince v. Massachusetts*, 321 U.S. 158 (1944) at pages 165-166. The Court of Appeals attempts to minimize the government's involvement in

the relationship between Thomas Leonhard and his children by emphasizing the divorce between Rochelle and Thomas Leonhard, by which Rochelle was awarded custody of the children. The fact remains, however, that the children were separated from, and the relationship with their father destroyed by the actions of the defendants.

The Court of Appeals states in its opinion "[t]he most critical fact in determining whether the rights of the children were violated is the fact that Rochelle had sole custody of them." The Court reads too much into the fact that the Leonhards' divorce decree granted custody of the children to Rochelle. Far from giving Rochelle complete and absolute control over the future of the children, the grant of custody to her was merely a recognition of the situation at that time. Thomas Leonhard, being employed at the time of the divorce, would have been unable to take care of the day-to-day needs of three children between the ages of three to seven. He was, however, ordered in the decree to pay child support and provide health insurance. In recognition of his absolute rights to see and visit with his children, he was granted weekend and holiday visitation rights. Further, in June of 1971, the New York State Supreme Court modified the original divorce decree to award the plaintiff custody of the children, a fact wholly ignored by the Court of Appeals in its decision.

As Rochelle had custody of the children at the time Calabrese was originally dealing with the Government, the Court of Appeals views her consent as sufficient to cut off any later claims on behalf of the children that they were deprived of their natural father. Although never presented with a set of facts such as these, this Court has never held that a natural parent's rights in his children can be severed completely without at least some showing of unfitness or an opportunity to be heard. For example, in *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court held that an unwed natural father must be given a hearing on his fitness as a

parent before he is deprived of the custody of his children after the death of their mother. See also, *Caban v. Mohammed*, 441 U.S. 380 (1979). Similarly, in *Armstrong v. Manzo*, 380 U.S. 545 (1965), the Court held that a natural father who was divorced from the mother of their child must be given notice and an opportunity to be heard before the child is adopted by the man whom the mother had remarried.

These cases acquire even greater significance when it is considered that the children here were *de facto* adopted by Calabrese, a convicted violent felony offender. Just as an adoption cuts off all rights and duties of a natural parent, the removal and concealment of the children at the instigation of and by the government, violated Thomas Leonhard's rights regarding his children and made it impossible for him to exercise his parental rights and responsibilities. By virtue of the same governmental intrusion, the rights of Thomas Leonhard's three children were cut off just as drastically.

Because the above cases deal on their face with the rights of the father, the children in the instant case are *in loco parentis*. Parents traditionally have been entrusted with the responsibility of taking whatever action is necessary to preserve the rights of their children. Under the circumstances of this case, it cannot be expected that Rochelle Leonhard would have pressed the children's rights not to be severed from the natural father. Only by including Thomas Leonhard as a part of the decision making process to remove and conceal his children, would the children have been provided with a true advocate for their rights. This principle was implicitly recognized by the Court of Appeals in footnote 28 of its opinion where it states: "[c]ertainly if both Rochelle and [Thomas] Leonhard had consented [to the children's removal and concealment] the children would have no claim."

The Court of Appeals relies heavily on *Parham v. J.R.*, 442 U.S. 584 (1979), to support its conclusions regarding the sufficiency of

Rochelle Leonhard's consent for the removal and concealment of the children and the necessity for notice and a hearing before removal. Involved in *Parham* was the issue of what procedures are constitutionally mandated before minors can be confined to mental institutions. The Court of Appeals, by noting that one parent who had custody of a minor had consented to the child's confinement in such an institution, holds that Rochelle Leonhard's consent alone was sufficient consent on behalf of the Leonhard children to their concealment and removal. First, the situation in *Parham* and the present case are completely different. The fact that one parent's consent is sufficient for purposes of medical treatment is surely not enough to allow a mother to completely remove and conceal children from their father. Secondly, there is no indication in *Parham* that the other parent opposed the admission of the child to the institution or that if that parent, in fact, so opposed, could not have petitioned for the child's removal.

Contrary to the Court of Appeals' assertion that *Parham* holds that minors have no right at all to a hearing before being committed to a mental institution, in *Parham* it was held "that some kind of inquiry should be made by a 'neutral factfinder' to determine if the statutory requirements for admission are satisfied." *Parham, supra*, at 606.

Here, the plaintiff children should never have been removed and concealed from their natural father without notice and a hearing. Here, the defendants acted without the slightest consideration for the effects upon the children's relationship with their natural father, balanced against the need for their removal. The Court of Appeals also stated that the nature of the risks of retaliation the children were exposed to should Calabrese be located made it impractical to hold any kind of hearing before they were removed. A review of the facts shows that no such risks even existed at the time. Rochelle Leonhard, in the affidavit relied upon so heavily in other contexts by the

Court of Appeals, states that she was informed by agents of the federal government and city that she and the children were never in any danger as a result of Calabrese's testimony. Secondly, any harm the children may have been exposed to was only as a result of the defendants' agreeing to provide protection for Calabrese in exchange for his testimony.

The Court of Appeals also states that "[t]he liberty interest in *Parham* was clearly more substantial than the interests of the children here in the possibility of periodic visits from their father." The trouble with this statement is that it confuses distinctly different matters. The needed treatment with its attendant confinement in an institution in *Parham* by definition could not have been provided in a home setting. At the least, in *Parham*, the natural parents had an opportunity to participate in their children's treatment and were not completely severed from them.

The same reasoning was used by the Court of Appeals in dismissing the plaintiffs' federal tort claims and the children's constitutional claims. Upon consideration of the above, the plaintiffs have likewise stated valid causes of action under the Federal Tort Claims Act, 28 U.S.C. §2674.

With regard to the state defendants, the Court of Appeals held that because the plaintiffs' complaint alleges their sole actions consisted of releasing Calabrese from prison in violation of state law, a claim has not been stated against them as their actions are too attenuated from the removal and concealment of the children and cites *Martinez v. California*, 444 U.S. 277 (1980). However, as opposed to the injury in *Martinez* which was almost completely unconnected with the lawful parole release decision; in this case, the decision to release Calabrese by the state defendants was done in contravention of state law and in full cooperation with the federal and city defendants in the plan to provide new identities and residences for Calabrese, the mother and the three plaintiff children. Indeed, it was not until

Calabrese had completed his part of the bargain by testifying that the state defendants released him, thereby enabling the federal government to fulfill what it had promised. Such involvement by the state defendants provides an adequate basis on which to assert a claim on behalf of the children. Cf. *Adickes v. S. H. Kress and Company*, 398 U.S. 144, 152 (1970).

As an alternative ground, the Court of Appeals affirmed the dismissal of the claims against the City of Buffalo because the plaintiffs did not allege that an official policy, regulation or custom was violated as required before liability may attach to that municipality pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The plaintiff's complaint does allege that Samuel Giambrone and others unknown, while employees of the police department of the City of Buffalo, acted in conjunction with the federal and state defendants in securing the release of Calabrese from prison and then removing and concealing the Leonhard children. Cooperation by a supervisory city police officer (Sgt. Giambrone) with federal and state law enforcement officials is a "custom or policy" of the City of Buffalo. Moreover, this Court has never held that a policy, custom or regulation must be pleaded in order to state a valid claim under 42 U.S.C. §1983, rather, it must be proven.

> By the plain terms of §1983, two — and only two — allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Gomez v. Toledo, ___ U.S. ___, ___, 100 S.Ct. 1920, 1923 (1980). As in *Gomez*, the instant plaintiffs have alleged all that is necessary in order to state a valid cause of action against the City of Buffalo.

Of particular significance in the context of this portion of the Court of Appeals' dismissal is the fact that defendant Sgt.

Samuel Giambrone never even moved to dismiss the complaint — rather, he answered. Notwithstanding this, the District Court and the Court of Appeals dismissed plaintiffs' claims against the answering defendant.

III.

The Claims of Thomas Leonhard and the Federal Tort Claims of All Plaintiffs are Not Time-Barred

The constitutional claims of Thomas Leonhard against the federal defendants are predicated upon the principles articulated in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Similar claims are asserted against the state and city defendants pursuant to 42 U.S.C. §1983. The applicable statute of limitations for the *Bivens* claims has been held to be either three or six years in New York. *Regan v. Sullivan*, 557 F.2d 300 (2nd Cir. 1977). A three-year period of limitations governs the §1983 claims. *Kaiser v. Cahn*, 510 F.2d 282 (2nd Cir. 1974).

Thomas Leonhard does not contest the length of the applicable period of limitations, but rather, will show that the Court of Appeals incorrectly determined its accrual; the point in time from which the period should be calculated. For present purposes, it will be assumed that a uniform three-year period applies to the constitutional claims asserted against all three groups of defendants.

As the Court of Appeals recognized, notwithstanding the fact that state law is looked to for the applicable period of limitations for these claims, federal law determines when the causes of action accrued. See, e.g., *Kaiser v. Cahn, supra*, at 285; *Lavellee v. Listi*, 611 F.2d 1129, 1130 (5th Cir. 1980). The plaintiffs' complaint was filed on June 30, 1978. It alleges that both the federal and city defendants participated in actively removing and concealing Thomas Leonhard's children from him for a continuous period from August, 1967, until July, 1975. It is also

alleged that these defendants not only initially unlawfully removed the children, but that they continued to violate Thomas Leonhard's constitutional rights in thereafter actively concealing the children. The children were concealed from Thomas Leonhard up until July, 1975. As the complaint was filed in June, 1978, this action was clearly commenced within three years of the accrual of the cause of action.

The Court of Appeals, however, instead of viewing the allegations of removal and concealment in the complaint as true for purposes of the motion to dismiss, held that because no "overt acts" were alleged as late as 1975, the claims were time-barred. The Court also went beyond the complaint and relied upon an affidavit of Rochelle Leonhard submitted in opposition to the motion to dismiss to determine that, because she details no conduct of the defendants past 1970, Thomas Leonhard's claims accrued at the latest in 1970.

First of all, by utilizing the method of review it did, the Court violated the basic principle that the allegations in the complaint are to be construed liberally in favor of the plaintiff and injected an "overt acts" pleading requirement without affording Thomas Leonhard the right to amend his complaint. Secondly, the Court ignores other paragraphs of Rochelle's affidavit in which she relates how the federal and city defendants participated in visits by herself and the children to the Buffalo area between 1967 and 1975. At the least, this affidavit supports the complaint's allegations that the defendants concealed the children from Thomas Leonhard until 1975.

Even if, upon the trial of this action, it is shown that the defendants did nothing past 1970, Thomas Leonhard's causes of action would still be valid. Because these defendants concededly took an active part in removing and concealing the children, even if their active participation ceased earlier than 1975, they cannot escape liability. Once the period of concealment began, it was only logical and natural that it continue, even if the

defendants ceased their active roles. There appears to be no reason why the defendants should not be held liable for the logical and natural consequences of their actions. Of course, there may come a point in time when the consequences of the removal and concealment become so far removed as to create a question of causation, but upon the present record, it cannot be said that this case falls within such an exception.

In the initial portion of its analysis, the Court of Appeals views the initial removal and concealment of the children as a potential cause of action on behalf of Thomas Leonhard, but states that the subsequent acts in support of the initial concealment should not give rise to new or renewed causes of action. In thus limiting the claims asserted by plaintiff, Thomas Leonhard, the Court of Appeals views the defendants' action in the wrong light. The defendants did not just remove the children and decide upon future action as the need arose, but rather, from the time of their initial acts up until July, 1975, the defendants acted in accordance with and in furtherance of their agreement with Calabrese, with the result that the father, Thomas Leonhard, was cut off from his children for this eight year period of time. Correctly viewed, the numerous actions of the defendants did not give rise to several individual causes of action, but rather were a continuous course of conduct which gave rise to a single cause of action.

Secondly, by characterizing the defendant's actions as it did, the Court of Appeals ignored the majority of contrary precedents. In contrast to the Court's holding, a number of other cases have held that continuous conduct violative of the Constitution gives rise to a continuing injury and a cause of action which accrues only upon the cessation of the wrongful conduct. Typical of this is *Donaldson v. O'Connor*, 493 F.2d 507, 529 (5th Cir. 1974), vacated on other grounds 422 U.S. 563 (1975), in which it was held that a cause of action under 42 U.S.C. §1983 for illegal confinement in a mental institution did not accrue until

the plaintiff had been released from the institution. Similarly, *Lavellee v. Listi, supra,* at 1132, holds that a §1983 claim for failure to provide medical care to a jailed individual does not accrue until the care is provided. Both of these cases characterize the conduct of the respective defendants as continuing as long as the condition of which the plaintiff complained was in existence. In a case of continuing injury, a plaintiff may recover for all damages caused by the defendant's course of conduct, even though the conduct predates the period of limitations. E.g., *Steubig v. Hammel,* 466 F.Supp. 31, 35 (M.D. Pa. 1977). See also, *Baker v. F & F Investment,* 420 F.2d 1191, 1200 (7th Cir.), cert. den. 400 U.S. 821 (1970); *Harper v. Union Savings Association,* 429 F.Supp. 1254, 1260 (N.D. Oh. 1977); *Landman v. Royster,* 354 F.Supp. 1302, 1315 (E.D. Va. 1973).

Just as in the above-cited cases, Thomas Leonhard's causes of action against the federal and city defendants did not accrue until he was reunited with his children; the time of the cessation of the defendants' course of conduct, or the natural and logical consequence of their prior actions. Because the date of the reunion (July 11, 1975) was less than three years prior to the filing of the summons and complaint in this action, the claims were timely commenced.

Similarly, because of the continuous nature of the injuries sustained, the federal tort claims of all the plaintiffs are timely because these claims were filed on June 27, 1977, within the two year period set forth in 28 U.S.C. §2401(b). Due to the continuing nature of the conduct and injuries in this case, the plaintiffs do not violate the construction of §2401(b) articulated in *United States v. Kubrick,* 444 U.S. 111 (1979). In *Kubrick,* the defendants' conduct had ceased much longer than two years before the claim was filed, while the conduct of the present defendants continued up until less than two years before the filing of these claims.

In addition to the above, the federal concealment doctrine likewise supports a July, 1975, accrual date for the constitutional claims of Thomas Leonhard. As articulated in the context of a claim under 42 U.S.C. §1983 in *Briley v. State of California*, 564 F.2d 849, 855 (9th Cir. 1977), "[t]he established rule, . . . , is that where a plaintiff has been injured by fraud or concealment and remains in ignorance of it without any fault or want of diligence on his part, the statutory period [of limitations] does not begin to run until *discovery* of the injury [citation omitted]."

Notwithstanding the fact that Thomas Leonhard knew his children had been taken from him in 1967, just as in a case of fraudulent concealment, the present defendants acted intentionally, in knowing disregard of Thomas Leonhard's rights in first removing his children and then refusing to disclose their whereabouts. Just as a successful plaintiff under this doctrine must act with diligence, Thomas Leonhard had at all times before his children were returned to him, actively sought their return, only to be frustrated in his efforts by the defendants. By recognizing the principles underlying this doctrine, and by their direct application, the actions of the present defendants should have been held to have barred the running of the statute of limitations against Thomas Leonhard until his children were returned to him.

With regard to the state defendants, the Court of Appeals held that because their sole actions were limited to releasing Calabrese from prison in 1968, the §1983 claims asserted against them by Thomas Leonhard were time barred. As this Court has recently held, a state's tolling provisions are borrowed together with its statute of limitations for claims under 42 U.S.C. §1983. *Board of Regents v. Tomanio*, ____ U.S. ____, ____, 100 S. Ct. 1790, 1795 (1980). Tolling principles under New York law operate to save a cause of action on behalf of a plaintiff who has been injured through the actions of a defendant, even though remote

in time, if those actions together with the subsequent conduct of other individuals caused the plaintiff's injuries.

Here, the state defendants acted in conjunction with the federal and city defendants in releasing Calabrese as part of the federal government's agreement to secrete Calabrese in exchange for his testimony. In doing so, the state defendants violated New York law concerning the release of individuals from prison. These defendants will also be shown to have acted with knowledge that their actions aided the removal of Thomas Leonhard's children from him. In fact, the state defendants had actual knowledge that Calabrese's marriage to Rochelle Leonhard was bigamous. As a result of their actions, these defendants should have reasonably foreseen the consequences of their actions, i.e., the removal and concealment of the children from Thomas Leonhard.

A tolling doctrine has been articulated by the state courts of New York which has been applied to actions analogous to those of the state defendants. In *Fonda v. Paulsen*, 46 App. Div. 2d 540, 545 (3rd Dept. 1975), it was held that a cause of action survived against a pathologist who could have reasonably foreseen that his findings would be relied upon by other physicians treating the plaintiff, notwithstanding the fact that the actions constituting his malpractice exceeded the statute of limitations. See also, *Holdridge v. Heyer-Schulte Corporation of Santa Barbara*, 440 F.Supp. 1088, 1099 (N.D.N.Y. 1977) (applying *Fonda, supra.*).

Under the principles mandating the application of New York's tolling provisions to the case at bar, because the actions of the state defendants could be reasonably foreseen to have aided in the removal and concealment of Thomas Leonhard's children from him, the claims asserted against them are not barred by the statute of limitations.

IV.

All Claims Asserted Against the State Defendants are Not Barred by the Eleventh Amendment

The complaint in this action names the New York State Department of Corrections, the New York State Board of Parole, Benjamin Ward, and his predecessors in office to 1967, and Eugene Hammock, and his predecessors in office to 1967, as defendants. Ward and Hammock are the directors of the Department of Corrections and the Parole Board respectively, and are sued in their official, as well as individual, capacities. One of the two grounds relied upon by the Court of Appeals in dismissing the claims of the three Leonhard children against these defendants is that the requests for damages were barred by the Eleventh Amendment. Presumably, had it not relied upon other reasoning, this rationale would have been used by the Court to dismiss the claims asserted against these defendants by Thomas Leonhard.

As far as its reasoning is articulated in its opinion, the Court of Appeals is correct in that the Eleventh Amendment bars the requests for damages from the state agencies and the individuals in their official capacities. For two reasons, however, the Court erred in dismissing all claims asserted against these defendants.

First, the individuals Ward, Hammock and their predecessors in office, are alleged to have exceeded and violated their statutory authority by cooperating with the Justice Department and in doing so, violated the constitutional rights of the plaintiffs. By virtue of this, these defendants have subjected themselves to personal liability, for which the Eleventh Amendment provides no protection.

As stated by this Court in *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974), "since *Ex parte Young*, 209 U.S. 123 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another

of a federal right under the color of state law." Therefore, as against Ward, Hammock and their predecessors in office, in their personal capacities, the plaintiffs have asserted valid claims.

Secondly, plaintiffs in their complaint requested a "judgment declaring unlawful the actions of defendants complained of herein". 28 U.S.C. §§2201, 2202. Because this request does not involve a demand for damages to be paid from the State's treasury, it likewise does not fall within the proscription of the Eleventh Amendment. Again, with reference to *Ex parte Young, supra*, this Court has stated "[i]t has been settled law since [*Young, supra*] that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment." *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 228 (1964).

As most, if not all, injunctions involve a preliminary finding of unlawful conduct, even though the instant plaintiffs do not request injunctive relief against the state defendants, their request for a declaratory judgment is maintainable notwithstanding the Eleventh Amendment. See, e.g., *Lee v. Board of Regents of State Colleges*, 441 F.2d 1257, 1260 (7th Cir. 1971).

CONCLUSION

For these reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

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